

**COURT OF APPEALS
DECISION
DATED AND FILED**

JANUARY 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1996

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF MOUNT PLEASANT,

PLAINTIFF-RESPONDENT,

v.

GERALD HOORNSTRA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

ANDERSON, J. Gerald Hoornstra appeals from a judgment finding that a building he owns constitutes a public nuisance in violation of TOWN OF MOUNT PLEASANT, WIS., PUBLIC NUISANCES ORDINANCE § 10.05 (1995), and ordering Hoornstra to repair the building so that it is habitable. Hoornstra contends that the building does not constitute a public nuisance and that the trial court exceeded its authority by ordering repairs to the building. We

conclude that the evidence supports the trial court's finding that the building constitutes a public nuisance. Because the intended use of the building is residential, as evidenced by Hoornstra listing the building for sale as a residential unit, the trial court properly ordered repairs consistent with this anticipated use. We affirm the judgment.

In the late 1980's, Hoornstra purchased a brick residential apartment building at 2101 Mead Street in the Town of Mount Pleasant, Wisconsin. The property has been used strictly as rental property and contains three or four family units. The last tenant moved out in February 1995 and the property has remained vacant since.

From February 1995 through February 1997, the only interior repairs to the building involved painting, general cleanup and sweeping. The exterior repairs included repairing the back stairs, enclosing the area below the stairs and boarding up several windows.

In July 1996, Hoornstra listed the building for sale with a real estate agent and it was advertised on the Multiple Listing Service. The property was described as "a Mount Pleasant brick three-family to be sold in as is condition." Hoornstra's agent described the downstairs unit as "semi-gutted"; it could be used as one unit or two. The asking price was \$19,900. At the time of trial in February 1997, the property was still listed with the same agent.

On July 2, 1996, Ron Meyer of the Town of Mount Pleasant Building and Zoning Department informed Hoornstra that an inspection revealed that the Mead Street property was dilapidated and blighted and constituted a public nuisance under the Town's ordinances. Hoornstra was ordered to either repair the existing structure to a habitable residence or to obtain a Town razing permit.

Hornstra was also notified that if he failed to obtain a valid building or razing permit, the Town would issue citations. Beginning on August 1, through August 12, 1996, the Town of Mount Pleasant issued several municipal citations to Hornstra for violations of TOWN OF MOUNT PLEASANT, WIS., PUBLIC NUISANCES ORDINANCE § 10.05 (1995) (hereinafter ORDINANCE) involving the Mead Street property. On August 8, 1996, Charles Wittig of the Town of Mount Pleasant Fire Department conducted a fire inspection of the exterior of the Mead Street property. A letter delineating his concerns was mailed on August 13, 1996.

On September 11, 1996, the parties stipulated to the facts, to consolidate the citations and to a finding of guilty in municipal court. Forfeitures were imposed in the amount of \$4316. Hornstra appealed to the circuit court. A trial was held on February 24, 1997. The court affirmed the municipal court judgment. Hornstra appeals.

Hornstra makes two contentions on appeal. He first argues that the evidence does not support the circuit court's judgment finding that the Mead Street property was in violation of ORDINANCE § 10.05. The court's decision that Hornstra's property constitutes a public nuisance is a mixed question of law and fact. A trial court's findings of fact shall not be set aside on appeal unless they are clearly erroneous. *See* § 805.17(2), STATS. Determining the applicability of a zoning ordinance to a given set of facts is a question of law that we review de novo. *See County of Sauk v. Trager*, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983).

The circuit court found that Hornstra violated ORDINANCE § 10.05(13) because of the premises' state of disrepair. ORDINANCE § 10.05(13) provides:

The following ... places, conditions ... are declared to be public nuisances affecting peace and safety ...:

....

(13) **BLIGHTED BUILDINGS AND PREMISES.** (a) Premises existing within the Town which are blighted because of ... failure to maintain them in a proper state of repair ... which depreciate property values and jeopardize or are detrimental to the health, safety, morals or welfare of the people of the Town.

The circuit court found that the Mead Street property violated the ordinance in the following ways: the building is designed and intended to be used as a dwelling; it was listed by a broker for residential purposes and the owner does not dispute that the use is primarily residential in nature; the building has remained vacant and boarded up for a substantial length of time thus defeating the building's intended use; and there have been no meaningful repairs on the premises since it became vacant. The court found that the building needed repairs to the interior ceiling, the interior walls, and the exterior masonry as well as rectifying prior violations involving the plumbing. The court also noted that the electrical wiring was suspect and it was uncertain whether there were current violations of the electrical code. The court concluded that Hoornstra violated the ordinance by failing to maintain the building in a proper state of repair so that the building's primary intended use as a place of dwelling could be met. These findings are supported by the record and are not clearly erroneous.

We further conclude that the circuit court correctly determined that Hoornstra's building violated ORDINANCE § 10.05(13) because of its state of disrepair. The building is residential in nature, and because of the state of repairs, it is currently unfit for habitation. Under the terms of the ordinance, the building constitutes a blighted building and, as such, a public nuisance.

Nevertheless, Hoornstra next argues that under *Donley v. Boettcher*, 79 Wis.2d 393, 255 N.W.2d 574 (1977), it is appropriate for an owner to close a building and simply because the building is currently vacant does not render it a public nuisance. He maintains that the circuit court's order requiring him to make the property tenantable when he had no intention of renting or using the premises is contrary to *Donley*. Again, we disagree.

In *Donley*, the owner had no intention of allowing humans to inhabit the building. See *Donley*, 79 Wis.2d at 407, 255 N.W.2d at 580. Since the purpose of the statute is to eliminate hazards to the public, and since the public would not be allowed in the building, the court found that the only repairs necessary were those required to make the building safe from structural collapse and sanitary for the public. See *id.*

In this case, however, Hoornstra is attempting to sell the property as a residential three-family home. As noted by the circuit court, Hoornstra does not dispute that the use of the building is primarily residential in nature or that he has listed it with a broker as such. Nor does he deny that very minimal repairs have been made to the building and that numerous repairs are necessary to make the property habitable.

Thus, this case is more akin to *Village of Williams Bay v. Schiessle*, 138 Wis.2d 83, 405 N.W.2d 695 (Ct. App. 1987). In *Schiessle*, this court concluded that because the defendants intended to rent the properties at issue as evidenced by ads in the local papers, the buildings had to be repaired so that they were fit for habitation, occupancy and use. See *Schiessle*, 138 Wis.2d at 87, 405 N.W.2d at 697. Similarly, we conclude that because Hoornstra intends to sell the

Mead Street property for residential use, such repairs as are necessary to make it habitable are required. We affirm the trial court.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE § 809.23(1)(b)4, STATS.

